(2) (2)

Nos. 93-1078 and 93-1173

Supreme Court, U.S.
FILED
JAN 27 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

BALTIMORE TEACHERS UNION, AMERICAN FEDERATION OF TEACHERS LOCAL 340, AFL-CIO, et al.,

v. *Petitioners,*

MAYOR AND CITY COUNCIL OF BALTIMORE, et al.,

Respondents.

BALTIMORE CITY LODGE NO. 3 OF THE FRATERNAL ORDER OF POLICE,

v. *Petitioner,*

MAYOR AND CITY COUNCIL OF BALTIMORE,

Respondent.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT AND CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

*Neal M. Janey
City Solicitor

Otho M. Thompson
Deputy Solicitor

Ambrose T. Hartman
Of Counsel

William R. Phelan, Jr.
Senior Solicitor

Burton H. Levin
Assistant Solicitor

Law Department
100 N. Holliday Street
Baltimore, Maryland 21202
(410) 396-3940
Attorneys for Respondents Mayor and City Council of Baltimore, Kurt L. Schmoke, Mary Pat Clarke, Jacqueline F. McLean, Neal M. Janey, George F. Balog, and the Board of Estimates of Baltimore City

*Counsel of Record

(Additional Counsel Listed On Inside Cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

J. Joseph Curran, Jr.
Attorney General of Maryland

*Marlene Trestman
Assistant Attorney General

200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6321
Attorneys for Respondent
State of Maryland

*Counsel of Record

QUESTIONS PRESENTED

I. WHEN A COLLECTIVELY BARGAINED LABOR CONTRACT BETWEEN A MUNICIPALITY AND ITS EMPLOYEES IS EXPRESSLY AND IMPLIEDLY SUBJECT TO LAW EXISTING AT THE TIME OF ITS EXECUTION – INCLUDING (1) AUTHORIZATION IN THE MUNICIPALITY'S CHARTER TO REDUCE APPROPRIATIONS TO BALANCE ITS BUDGET, AND (2) A STATE BUDGET RECONCILIATION LAW AUTHORIZING THE MUNICIPALITY TO REDUCE PREVIOUSLY APPROVED APPROPRIATIONS IN LIGHT OF BUDGET SHORTFALLS OCCASIONED BY REDUCTIONS IN STATE AID – DOES A FURLOUGH, AMOUNTING TO A REDUCTION OF THE EMPLOYEES' BARGAINED FOR ANNUAL INCOME BY LESS THAN ONE PERCENT, IMPLEMENTED IN RESPONSE TO DRASTIC CUTS IN STATE AID CAUSING THE MUNICIPALITY TO SUFFER A BUDGET DEFICIT, CONSTITUTE AN "IMPAIRMENT" OF THE MUNICIPALITY'S CONTRACTUAL OBLIGATION WITHIN THE MEANING OF THE CONTRACT CLAUSE, U.S. CONST. ART. I, § 10, CL.1?

II. IS A "SUBSTANTIAL" IMPAIRMENT OF A CONTRACTUAL RELATIONSHIP OCCASIONED BY A FURLOUGH OF MUNICIPAL EMPLOYEES WHICH RESULTS IN A LOSS OF .95% OF THE EMPLOYEES' BARGAINED FOR GROSS ANNUAL SALARY, WHEN THE FURLOUGH IS IMPLEMENTED TO BALANCE THE MUNICIPALITY'S BUDGET IN LIGHT OF DRASTIC AND UNEXPECTED REDUCTIONS IN STATE AID?

III. DOES THE CONTRACT CLAUSE EVER PERMIT A LOCAL GOVERNMENT TO SUBSTANTIALLY IMPAIR A LABOR CONTRACT WITH ITS OWN EMPLOYEES?

LIST OF PARTIES TO THE PROCEEDING

NO. 93-1078

Petitioners are the Baltimore Teachers Union and the City Union of Baltimore. Respondents are the Mayor and City Council of Baltimore ("Baltimore City" or "the City"), a municipality, the members of the City's Board of Estimates (Kurt L. Schmoke, Mary Pat Clarke, Jacqueline F. McLean, Neal M. Janey and George F. Balog), the Board of Estimates of Baltimore City, and the State of Maryland.[1]

NO. 93-1173

Petitioner is Baltimore City Lodge No. 3 of the Fraternal Order of Police. Respondent is the City of Baltimore.

---

[1] The State of Maryland sought to intervene in the United States District Court for the District of Maryland, pursuant to 28 U.S.C. § 2403(B), but its motion to intervene was denied by the district court. The State appealed such denial to the Court of Appeals for the Fourth Circuit, which declined, on the grounds of mootness, to review the district court's denial of the State's motion to intervene. With regard to the State's appeal the court of appeals stated: "Our disposition of this case renders moot, however, the State of Maryland's appeal from the district court's denial of its motion for leave to intervene, and accordingly, we decline to review that ruling." See App. 57-58, n. 14, to Petition for Certiorari in No. 93-1078. (App. ___ references are to the appendix to the Petition for Certiorari in No. 93-1078). If this Court determines that the State of Maryland is not properly a party for purposes of Supreme Court Rule 12.4, then the State of Maryland respectfully requests that the State's participation in this Brief in Opposition be treated as a brief of an *amicus curiae*.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

REASONS FOR DENYING THE WRIT 1

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

AFSCME/Iowa Counsel 61 v. Iowa, 484 N.W. 2d 390 (Iowa 1992) 8

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 4, 6

Association of Surrogates v. New York, 577 N.E. 2d 10 (N.Y. 1991) 8

Association of Surrogates v. New York, 588 N.E. 2d 51 (N.Y. 1992) 8

Association of Surrogates v. New York, 940 F.2d 766 (2nd Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 936 (1992) 5, 6, 7, 8

Carlstrom v. Washington, 694 P.2d 1 (Wash. 1985)..... 8

Chiles v. United Faculty of Florida, 615 So.2d 671 (Fla. 1993)..... 8

Condell v. Bress, 982 F.2d 415 (2nd Cir. 1993), cert. denied, ___ U.S. ___, 113 S.Ct. 1849 (1993) 8

General Motors v. Romein, ___ U.S. ___, 112 S. Ct. 1105 (1993)..... 2

Kestler v. North Carolina Local Government Employees' Retirement System, 808 F. Supp. 1220 (W.D. N.Y. 1992)..... 8, 9

Linkletter v. Walker, 381 U.S. 618 (1965)..... 3

Massachusetts Trustees v. United States, 377 U.S. 235 (1965) 3

McCray v. New York, 461 U.S. 961 (1983) 4, 7

TABLE OF AUTHORITIES – Continued

Page

Opinion of the Justices, 609 A.2d 1204 (N.H. 1992) 9

Sanson Hosiery Mills v. NLRB, 344 U.S. 863 (1952) 2

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 1, 2, 4, 5, 6, 9

CONSTITUTIONAL PROVISION:

U.S. Const., Art. 1, §10, cl. 1..... *passim*

MISCELLANEOUS:

Frankfurter, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 Harv. L. Rev. 577 (1938) 8

REASONS FOR DENYING THE WRIT

I

Relying on a purported conflict between the decision below and decisions of the Second Circuit and several state courts of last resort, and relying further on a purported lack of clarity emanating from the decisions of the Supreme Court, petitioners ask this Court to grant certiorari and decide under what circumstances a furlough[1] of municipal employees which constitutes a substantial impairment of their contract with the municipality is sufficiently "reasonable and necessary" to satisfy the Constitution's prohibition against governmental impairment of the obligation of contracts. U.S. Const., Art. 1, § 10, cl. 1. Petitioners ask this Court to explain what it meant when it held that "*complete* deference to a legislative assessment of reasonableness and necessity is not appropriate [in cases involving modification of a State's own financial obligations] because the State's self-interest is at stake." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977) (emphasis added).[2]

---

[1] The furlough referred to in this case consisted of a reduction of annual gross salary by 0.95%. The City withheld one-half day's pay per two-week pay period for five successive pay periods. Pay scales, the step movement process, hourly rates of pay and overtime pay were not affected. Moreover, there was no change in any benefit the level of which depended on rate of pay or salary scale.

[2] The cases giving rise to the petitions were filed separately but disposed of by the same order of the district court. App. 21. Appeals in both cases were consolidated in the court of appeals. App. 23. In substance both petitions present for review the same question arising under the Contract Clause.

The writ should be denied. The Court is not likely to reach petitioners' questions because there are other meritorious arguments supporting the decision below without regard to the questions sought to be raised by petitioners. *Sanson Hosiery Mills v. National Labor Relations Board,* 344 U.S. 863 (1952). Before the "reasonableness and necessity" of governmental action will be examined under the Contract Clause there must be an "impairment" of a contract. *General Motors v. Romein,* ___ U.S. ___, 112 S. Ct. 1105, 1109 (1993). In this case the furlough did not constitute an "impairment" of the contract between Baltimore City and its employees, because the City's action was authorized by a City Charter provision and a state statute, as set out by Judge Widener in his concurring opinion. As Judge Widener stated, "Because I believe that the terms of the Memoranda of Understanding between the City and the police unions and the terms of the collective bargaining agreements between the City and the teachers' unions necessarily included the statutory and charter authorization for the Board of Estimates' actions, . . . I do not believe there was any impairment of the contract." App. 59. (Opinion of Widener, J., concurring).[3]

Even if the questions presented by petitioners would be reached by the Court on either of these records, certiorari should be denied. There is no real conflict between the decision below and the cases petitioners rely upon to demonstrate a conflict. (See *infra,* 5). To the extent the cases cited by petitioners involve the Contract Clause, they, like the decision of the court below, follow *United*

---

[3] See respondents' first question presented, *supra,* at i.

States Trust in acknowledging that *some* deference is owed to the legislative assessment of the reasonableness and necessity of an impairment of a government's own contract; the different results are explainable on the basis of the peculiar facts and circumstances of each case, not because different legal standards were employed. This case, therefore, does not involve a question of constitutional law that has not already been decided by the Supreme Court, or about which the lower courts are split.

Certiorari should be denied, additionally, because it is not appropriate now. The questions posed in the petitions are not ripe for review. Although the economic doldrums of the early 1990's produced a handful of public employee furlough cases decided under the Contract Clause, the economy has recovered sufficiently to make it unlikely that the circumstances giving rise to the emergency furlough in the instant case are now being repeated on a significant basis across the Nation; and petitioners cite only one pending case involving the alleged impairment of a collectively bargained governmental contract. With the paucity of cases which have been and reasonably may be expected in the future to be decided involving the issue presented in the petitions, discretionary review by the Supreme Court is not warranted. *Cf., Massachusetts Trustees v. United States,* 377 U.S. 235, 237 (1965) (certiorari granted because of a conflict and the fact that "a considerable number of suits are pending in the lower courts which will turn on resolution of these issues"); *Linkletter v. Walker,* 381 U.S. 618, 620 (1965) (certiorari granted because of a conflict over "what has become a most troublesome question in the administration of justice"). Similarly, before this Court enters into the thicket

of determining when public employee furloughs are "reasonable and necessary" in light of a fiscal crisis, it should have the benefit of "further study" of the issue by the lower courts. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Opinion of Stevens, J., respecting denial of certiorari).

Discretionary review by the Supreme Court should also be denied because the decision of the lower court was correct and fair. As observed by the lower court, Baltimore City took what were needed and measured steps to absorb extraordinary reductions in revenue. The City resorted to a furlough to balance its budget and avoid further layoffs only *after* it tried layoffs, job abolishments and early retirements. Thus, the lower court correctly held that the City did not consider salary reductions on a par with other policy choices. *See United States Trust*, 431 U.S. at 29-31. As required by *United States Trust*, the City tailored the furlough plan as narrowly as possible to meet unforeseen shortfalls in revenue. The amount of the pay reduction, less than 1% of petitioners' gross annual pay, was no greater than that necessary to meet the anticipated shortfall. The plan did not alter pay-dependent benefits, overtime pay, hourly rates of pay, or the orientation of pay scales.[4] Unlike the special interest character of the legislation struck down in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) the City's plan did not narrowly target specific classes of

---

[4] Respondents assert that any impairment which occurred in this case was not substantial enough to be of constitutional magnitude. See respondents' second question presented, *supra*, at i.

employees; it extended to all City employees. And the plan, which was discontinued at the first opportunity, "affect[ed] simply a temporary alteration of the contractual relationships of those within its coverage." *Spannaus*, 438 U.S. at 250.

II

The decision below is not in conflict with any other case. Petitioners cite several cases which they assert are in "direct conflict" with the Fourth Circuit's holding, but all of those cases are distinguishable on the facts or the law, or both. Indeed, the analytical framework adopted in the decisions petitioners cite is consistent with that employed by the court below.

In *Association of Surrogates v. State of New York*, 940 F.2d 766 (2nd Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 936 (1992) (*"Surrogates"*), upon which petitioners principally rely, the Second Circuit considered whether New York violated the Contract Clause when it sought to solve a budget crunch and finance an expansion of its court system by deferring the wages of certain court employees contrary to their collective bargaining agreements. Scrutinizing New York's "lag-payroll" plan in light of *United States Trust*, the court concluded that the plan "smack[ed] of political expediency." 940 F.2d at 773.

> [B]y placing the costs of improvements to the court system on the few shoulders of judiciary employees instead of the many shoulders of the citizens of the state, [the New York legislature and Governor] ruffle only a few feathers and fight the "exploding drug crisis." . . . But the only people paying for the new courts are the

> few employees of the judicial branch who are subjected to the lag payroll. The Contract Clause bars such expedient *post hoc* changes in contractual obligations. [*Id.*]

The decision below is not to the contrary. Indeed, in the course of examining the *measured steps* Baltimore City took in response to extraordinary reductions in state revenue, the Fourth Circuit distinguished *Surrogates* factually.

> The City's obvious reluctance to resort to the plan and its decision to do so only when it concluded that it had no better alternative belies the "political expediency" suspected in *Surrogates*, 940 F.2d at 773, and confirms that the City did not consider salary reductions on a par with other policy choices, *see United States Trust*, 431 U.S. at 29-31. [App. 50 (6 F.3d at 1020)]

In *Surrogates* the state "plac[ed] the costs of improvements of the court system on the few shoulders of judiciary employees instead of the many shoulders of the citizens of the state," 940 F.2d at 773; but in the instant case, "unlike the special interest character of the legislation at issue in *Spannaus*, Baltimore's plan did not narrowly target specific classes of employees: it extended to all City employees." App. 53 [6 F.3d at 1021].

The Fourth Circuit cited *Surrogates* without criticism,[5] and distinguished it on the facts. Viewed from the

---

[5] In rejecting the argument of respondents that any impairment of contract in the instant case was not "substantial" enough to be constitutionally significant the Fourth Circuit expressly *followed Surrogates*. See App. 42, n. 8 [6 F.3d at 1018, n. 8]

standpoint of the legal and analytical framework applied, however, the cases are in harmony. Nevertheless, petitioners compare *dicta* in the two cases and conclude they are in "direct conflict."

In *Surrogates* the Court stated in *dicta*:

> Indeed, it would be inconsistent for us to accept the defendants' argument that this impairment was necessary because of a governmental fiscal crisis, and to do so by disregarding the personal fiscal crises that the lag payroll would create. [940 F.2d at 772]

Petitioners contrast such *dicta* with that of the court below:

> [T]he plan affected reliance interests not wholly unlike those of private entities in regulated industries, which contract subject to future, additional regulation. [citations omitted] Public employees – federal or state – by definition serve the public and their expectations are necessarily defined, at least in part, by the public interest. It should not be wholly unexpected, therefore, that these public servants might well be called upon to sacrifice first when the public interest demands sacrifice. [App. 54 (6 F.3d at 1021)]

Irrespective of whether the *dicta* of the Second and Fourth Circuits show an inconsistency, it cannot be said that the cases evidence a real conflict on the same subject matter of law or fact. Since the cases do not involve a "head-on collision," rather than adjusting any conflict now, it would be a wise exercise of discretion to allow the issue to receive fuller study before it is addressed by the Supreme Court. See *McCray v. New York*, 461 U.S. 961, 963

(1983) (Opinion of Stevens, J., respecting denial of certiorari). See also Frankfurter, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 Harv. L. Rev. 577, 596-97 (1938).[6]

AFSCME/Iowa Counsel 61 v. Iowa, 484 N.W. 2d 390 (Iowa 1992) and *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993) are distinguishable on the law. *AFSCME* arose from a binding contract arbitration award which establish a pay increase for state employees. The arbitration process had been established by statute. The Supreme Court of Iowa held that the state was required to fund the pay increases, but the court did not have occasion to decide any issue under the Contract Clause of the United States Constitution. Accordingly, *AFSCME*, which did not cite *United States Trust* or any other Contract Clause case decided by this Court, is distinguishable on the law. Similarly, *Chiles* was decided under Article I, § 10 of the Florida Constitution, and did not involve a claim based on the Contract Clause of the Federal Constitution.

Carlstrom v. Washington, 694 P.2d 1 (Wash. 1985) and *Kestler v. North Carolina Local Government Employees'*

---

[6] *Condell v. Bress*, 982 F.2d 415 (2nd Cir. 1993), cert. denied, ___ U.S. ___, 113 S.Ct. 1849 (1993), *Association of Surrogates and Supreme Court Reporters v. State of New York*, 577 N.E. 2d 10 (N. Y. 1991), and *Association of Surrogates and Supreme Court Reporters v. State of New York*, 588 N.E. 2d 51 (N.Y. 1992) emanated from the same "lag payroll" scheme invalidated by the Second Circuit in *Surrogates*. Petitioners assert these cases are in conflict with the decision below. The cases are factually distinguishable from the instant case, for reasons similar to those are already explained with regard to the Second Circuit decision in *Surrogates*. They do not establish a real conflict on the same subject matter of law or fact and do not, any more than *Surrogates*, support issuance of the writ of certiorari.

Retirement System, 808 F. Supp. 1220 (W.D.N.C. 1992) are distinguishable on the facts. In *Carlstrom* the state, in response to a fiscal emergency, failed to implement a salary increase provided for in a collective bargaining agreement. The court found the impairment unreasonable and unnecessary because the economic emergency was both expected and foreseen. In the instant case by contrast, the drastic reduction in state financial aid to Baltimore City, which occurred well into the fiscal year, was unforeseen by the City and created an emergency it was powerless to avert.

Kestler is inapposite because it does not involve a contract impairment in response to a fiscal emergency. A disabled former police officer challenged the constitutionality of the imposition of an earnings cap which would reduce his vested disability pension benefits. The earnings cap, which was enacted to correct inequities in the pension system, became effective after the plaintiff's benefits had vested, and could not be applied retroactively to him. The issues raised in *Kestler* are remote from those in the instant case.

The last case petitioners rely upon as allegedly in conflict with the decision below is *Opinion of the Justices*, 609 A.2d 1204 (N.H. 1992), where the court advised the state legislature that a bill requiring certain state employees to take unpaid leave would violate the Contract Clause. The court found the measure an act of mere political expediency since the state made no effort to reduce non-contractual services before impairing contracts with its employees. The planned furlough was struck down under *United States Trust*. By contrast, in the instant case the City resorted to a furlough only after it tried layoffs, job abolishments and early retirements,

leading the court below to observe that "[t]he City's obvious reluctance to resort to the plan and its decision to do so only when it concluded that it had no better alternative belies the [conclusion that the City's motivation was] "political expediency." App. 50.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

*Neal M. Janey
City Solicitor

Otho M. Thompson
Deputy Solicitor

Ambrose T. Hartman
Of Counsel

William R. Phelan, Jr.
Senior Solicitor

Burton H. Levin
Assistant Solicitor
Room 107, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202
(410) 396-3940
Attorneys for Respondents Mayor and City Council of Baltimore, Kurt L. Schmoke, Mary Pat Clarke, Jacqueline F. McLean, Neal M. Janey, George F. Balog, and the Board of Estimates of Baltimore City

J. Joseph Curran, Jr.
Attorney General
of Maryland

*Marlene Trestman
Assistant Attorney
General

200 St. Paul Place
Baltimore, Maryland
21202
(410) 576-6321
Attorneys for Respondent State of Maryland

January 1994

*Counsel of Record